

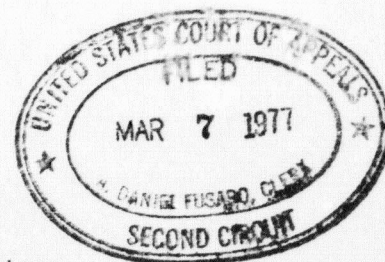
***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
APPENDIX**

76-5044

**United States Court of Appeals
For The Second Circuit**



In re
INTERSTATE STORES, INC., *et al.*,
Debtors,

CALIFORNIA WHOLESALE ELECTRIC COMPANY,
formerly known as Esgro, Inc.,
Appellant,
against

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorgani-
zation Trustees for Interstate Stores, Inc., *et al.*, *Debtors,*
Appellees.

B 815

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPENDIX OF APPELLEES

SHEA GOULD CLIMENKO & CASEY
Attorneys for Appellees
330 Madison Avenue
New York, New York 10017
(212) 661-3200

PAGINATION AS IN ORIGINAL COPY

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EXTRACT OF DOCKET CONTAINING
RELEVANT DOCKET ENTRIES

SA 1

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- INTERSTATE STORES, INC.

74 B 614

DATE	Paper #	PROCEEDINGS
2/3/77	(409)	Filed NOTICE OF ENTRY, of Bkey. Judge's order dated 1/31/77. f.
2/9/77	(410)	Filed ORDER ENLARGING TIME pursuant to Bankruptcy Rule 906(b). So ordered Tenney, J. dated 2/8/77. True Copy
2/10/77	(411)	Filed ASTIPULATION OF SETTLEMENT, by Appellee John E. Hancock, & Appellant Dominick's Finer Foods, Inc. that disposition of this appeal, is so further indicated. So ordered Mansfield, J. Van Graafeiland, J. & Owen J. dated 2/3/77 m/n Krause, Hirsch & Gross 41 E 42nd St. N.Y.- Shea Gould Climenko & Casey 330 Madison Ave. N.Y.- Rogers Hoge & Hills 90 Park Ave. N.Y.
2/14/77	(412)	Filed ORDER TO SHOW CAUSE, why an order Purs. to F.R.A.P. Rule 10(e) should not be entered permitting the Trustees to file with the clerk of this Court etc. Ret: 2/18/77 at 4:00P.M. in Rm. 1001. f.
2/17/77	(413)	Filed AFFIDAVIT IN OPPOSITION to Trustees' Application to Supplement Record on Appeal, by Bruce R. Zirinsky. f.
2/23/77	(414)	Filed REPLY AFFIDAVIT of Daniel L. Carroll.
2/23/77	()	Filed MEMO ENDORSED on back of paper #412, it is the order of this court that the Trustees are permitted to file with the clerk of this court, & the clerk of this court is directed to receive for filing, the supplemental materials proposed by the Trustees in their present application, & so further indicated. So ordered Gagliardi, J. dated 2/22/77.
2/24/77	(415)	Filed COPY of Judgment, from Los Angeles dated 1/7/77. (Additional Papers) f.
2/24/77	(416)	Filed Additional Papers, CROSS COMPLAINT of Esgro, Inc. In California Proceeding. f.
2/24/77	(417)	Filed First Amended Cross Complaint for Fraud, Misrepresentation, Breach of Contract, Interference with Contractual Relations & prospective advantage & Rescission. f.

EXTRACT OF DOCKET CONTAINING
RELEVANT DOCKET ENTRIES

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PAPER #INTERSTATE STORES, INC.

74 B 614

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|---------|-------|----------------------------------------------------------------------------------------------------|
| 2/24/77 | (418) | Filed Additional Papers, Transcript of 12/9/76 in California Proceeding. f. |
| 2/24/77 | (419) | Filed Additional Papers, Transcript of December 6, 1976, in California Proceeding. f. |
| 2/25/77 | (420) | Filed Notice of Supplemental Record on Appeal has been Certified & Transmitted to USCA on 2/25/77. |
| 2/25/77 | (421) | Filed NOTICE OF ENTRY, of an Order dated 2/22/77. |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

In re	:	Reorganization Nos.
	:	74 B 614-802 Inclusive
INTERSTATE STORES, INC., formerly :	:	J.M.C.
known as INTERSTATE DEPARTMENT	:	
STORES, INC., et al.,	:	
Debtors.	:	<u>ORDER TO SHOW CAUSE</u>

- - - - - x

Upon the annexed affidavit of Daniel L. Carroll, sworn to February 11, 1977 and upon all proceedings heretofore had herein in connection with the Trustees' application to strike the amended Proof of Claim 7273A of Esgro, Inc. and sufficient cause appearing therefor, it is

ORDERED, that Esgro, Inc. show cause before the Honorable John M. Cannella, United States District Judge at the United States Courthouse, Foley Square, New York, New York, Room 1001 on the 18th day of February, 1977 at 4: p.m. or as soon thereafter as counsel can be heard why an order ^{PARS. TO F.R.A.P. Rule 10(2)} should not be entered permitting the Trustees to file with the clerk of this Court and directing the clerk of this Court to receive for filing the following papers which form part of the record in the proceeding between debtor White Front Stores, Inc., et al. and Esgro, Inc., et al. in the Superior Court of the State of California for the County of Los Angeles:

- 1) the Cross Complaint of Esgro, Inc.;
- 2) the proposed First Amended Cross Complaint of Esgro, Inc.;
- 3) the transcript of the hearing held in connection with said California Proceeding on December 6, 1976;
- 4) the transcript of the hearing held in connection with said California Proceeding on December 9, 1976; and

5) the judgment entered in the California
Proceeding on January 7, 1977;

and it is further

ORDERED, that service of a copy of this Order and the
affidavit upon which it is based, upon Messrs. Weil, Gotshal &
✓ Manges, attorneys for Esgro, Inc., on or before 2:00 p.m. on the
✓ 15th day of February 1977 by personal service shall be deemed good
and sufficient service hereof; and it is further

ORDERED, that answering papers, if any, shall be served
upon Messrs. Shea Gould Climenko & Casey, attorneys for the
Trustees, 330 Madison Avenue, New York, New York 10017 on or
before 2:00 p.m. on the 17 day of February 1977.

Dated: New York, New York
February 14, 1977

s/ Charles T. Tenney
United States District Judge
(PART-ONE) EA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In Re	:	Reorganization
	:	Nos. 74 B 614-802,
INTERSTATE STORES, INC., formerly	:	Inclusive
known as INTERSTATE DEPARTMENT	:	
STORES, INC., et al.,	:	
Debtors.	:	<u>AFFIDAVIT</u>

-----x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DANIEL L. CARROLL, being duly sworn, deposes and
says:

1. I am associated with the firm of Shea Gould Climenko & Casey, attorneys for the Trustees in the above entitled matter. I make this affidavit in support of the Trustees' application for an order permitting the Trustees to file with the clerk and directing the clerk to receive for filing certain papers which form a part of the record of the proceeding presently pending in the Superior Court of the State of California between certain of the debtors and Esgro, Inc. (the "California Proceeding").

2. The Trustees' objection to Claim No. 7273A of Esgro, Inc. ("Esgro") was scheduled for trial before the Honorable Lee Gagliardi in November of 1976. Shortly before the trial, Esgro filed an Amended Proof of Claim which the Trustees moved to dismiss. During the course of the conference held on November 16 (which was also the adjourned

return date of the Trustees' motion to dismiss Esgro's Amended Proof of Claim), Judge Gagliardi granted that motion and the Trustees' motion papers were so endorsed. This endorsed order, although dated November 17, 1977, apparently was not physically entered by the clerk until November 24, 1976.

3. On November 23, 1976, the Court of Appeals rendered an Order--which was not entered in the Bankruptcy Court until November 26--granting Esgro's motion for a stay of Judge Cannella's September 1, 1976 order. That order had directed that the trial of Trustees' objection to Esgro's Claim 7273A proceed in this Court. The November 23 Order of the Court of Appeals further directed the parties to proceed to trial in the California Proceeding where an action was pending involving the same issues presented by Esgro Claim 7273A.

4. On November 29, 1976, the date set for trial in the California Proceeding, Esgro made a motion in the California Proceeding seeking the California Court's permission to file an amended cross-complaint in that proceeding.* Like the original cross-complaint, which was substantially identical to the original Proof of Claim filed by Esgro herein, the proposed amended cross-complaint was substantially identical to the Amended Proof of Claim which was dismissed by Judge Gagliardi in his November 17, 1976 Order. On December 6, 1976,

* The California Proceeding had been instituted by the White Front Debtors in February of 1973 to recover rent and other amounts due under the license agreements between the parties. Esgro's cross-complaint was served in July of 1973 and, as noted, contained allegations substantially identical to those contained in Esgro's Proof of Claim 7273A.

prior to the commencement of the trial of the California Proceeding, the Honorable Max Deutz, Judge of the California Superior Court, denied Esgro's motion to file an amended cross-complaint. Meanwhile, by Order to Show Cause dated December 3, 1976, Esgro, Inc. moved before this Court for an order either vacating or modifying Judge Gagliardi's November 17, 1976 endorsed order. On December 9, 1976, Judge Gagliardi spoke with Judge Deutz in California and following that conversation Judge Deutz dictated on the record the substance of what had been said in that conversation. On December 15, 1976, Judge Gagliardi rendered a memorandum decision amending his prior endorsed order which, in effect, reconfirmed the decision striking Esgro's Amended Proof of Claim but explained the reason therefor. Esgro has now appealed from that December 15 decision and order.

5. In order to fully apprise the Court of Appeals of the background of Judge Gagliardi's December 15, 1976 decision and the subsequent proceedings held in the California Superior Court, the Trustees seek permission to file certain papers which form part of the California Proceeding. If such permission is granted, the Trustees will then transmit such papers to the Court of Appeals where they will form a part of the record on appeal. The papers which the Trustees seek to file include (1) the original cross-complaint filed by Esgro in the California Proceeding in July of 1973, (2) Esgro's proposed amended cross-complaint in the California Proceeding, (3) the transcript dated December 6, 1976 reflecting Judge Deutz' denial of Esgro's motion to file the amended cross-

complaint, (4) the December 9, 1976 transcript reflecting Judge Deutz' summary of his conversation with Judge Gagliardi, and (5) the January 7, 1977 judgment entered by the California Court following a jury verdict in favor of the debtors in the California Proceeding. Copies of said papers are annexed hereto as Exhibits A through E, respectively.

6. It is respectfully submitted that the documents sought to be filed form a necessary part of the record in this proceeding and are required in order for the Court of Appeals to be fully apprised of the factual background of Esgro's appeal. For example, Esgro has not even mentioned in the brief it has filed with the Court of Appeals the fact that its proposed amended cross-complaint was rejected by the California Court. I respectfully suggest that this is something in which the Court of Appeals would be very interested in considering Esgro's argument that this Court's dismissal of the Amended Proof of Claim was improper. The basis for the California Court's ruling is explained in the transcript annexed hereto as Exhibit C.

7. Without mentioning that its proposed amended cross-complaint was rejected by the California Court, Esgro argues in its brief to the Court of Appeals that "[t]he California Court interpreted the District Court's order striking Esgro's amended proof of claim as a restriction on its jurisdiction". Of course, there is absolutely no basis for this argument in the record presently before the Court of Appeals. The transcripts now sought to be filed (Exhibits C and D) de-

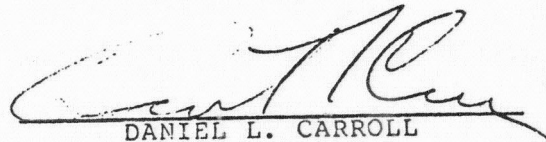
monstrate that although the California Court expressed the opinion that the California Proceedings "must be tried within the parameters of the claim filed in New York" (Exhibit C, p. 2), its decision to reject Esgro's proposed amended cross-complaint was based upon its conclusion that such an amendment should not be permitted under California law because it would be "substantially prejudicial" to the debtors (Exhibit C, pp. 3-4, 7-9). Indeed, an examination of Exhibit D shows that the "jurisdictional" problems referred to above were discussed by Judge Gagliardi and Judge Deutz on December 9, 1976 at which time Judge Gagliardi told Judge Deutz that "he did not want to hinder the [California] proceedings ... and would be inclined to make an order whichever way [Judge Deutz] felt that the matter should go here in California" to which Judge Deutz responded that he had made his decision rejecting Esgro's proposed amended cross-complaint on the basis of California law as well as his feeling about the "jurisdictional" question. (Exhibit D, pp. 1-2).

8. I respectfully submit that the above facts are extremely relevant to the issues presented on Esgro's appeal. In fact, the outcome of the California trial, which proceeded for four full weeks, should be brought to the attention of the Court of Appeals. In effect, Esgro, after succeeding in its endeavor to have its claim tried in the California state courts and after receiving a full jury trial thereon is now in effect asking the Court of Appeals to permit it to file, presumably for adjudication in this Court, an amended proof of claim, presenting claims which were rejected by the California Court. The annexed documents, if filed herein and

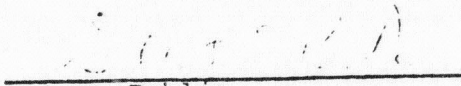
made part of the record on appeal, will fully apprise the Court of Appeals of the complete factual background of the questions before it. As it now stands, the Court of Appeals has before it, at best, only half of the story.

9. No application for the relief requested herein has previously been made. The reason this application is sought to be brought on by order to show cause is that the Trustees' brief to the Court of Appeals must be filed by March 7 and, if this application is granted, the documents will have to be transmitted to the Court of Appeals for inclusion in the record on appeal and made part of a supplemental appendix.

WHEREFORE, it is respectfully requested that an order be entered permitting the Trustees to file with the clerk and directing the clerk to receive for filing the documents described above.


DANIEL L. CARROLL

Sworn to before me this
14th day of February, 1977.



Notary Public

GUYTON E. BROWN
Notary Public, New York
U.S. District Court
Southern District of New York
March 30, 1978

EXHIBIT A, ANNEXED TO ORDER TO SHOW CAUSE
AND AFFIDAVIT OF DANIEL L. CARROLL.

(Reproduced, supra, at pp. SA 22 to SA 31,
as Cross-Complaint in Superior Court of
California, County of Los Angeles)

EXHIBIT B, ANNEXED TO ORDER TO SHOW CAUSE
AND AFFIDAVIT OF DANIEL L. CARROLL.

(Reproduced, supra, at pp. SA 32 to SA 42,
as First Amended Cross-Complaint to
Superior Court of California, County of
Los Angeles)

EXHIBIT C, ANNEXED TO ORDER TO SHOW CAUSE
AND AFFIDAVIT OF DANIEL L. CARROLL.

(Reproduced, supra, at pp. SA 43 to SA 57, as
Transcript of the hearing in California
Proceeding, 12-6-76)

EXHIBIT D, ANNEXED TO ORDER TO SHOW CAUSE
AND AFFIDAVIT OF DANIEL L. CARROLL.

(Reproduced, supra, at pp. SA 58 to SA 67,
as Transcript of the hearing in California
Proceeding, 12-9-76)

EXHIBIT E, ANNEXED TO ORDER TO SHOW CAUSE
AND AFFIDAVIT OF DANIEL L. CARROLL.

(Reproduced, supra, at pp. SA 68 to SA 74
as Judgment entered in California
Proceeding, 1-7-77)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In re :

INTERSTATE STORES, INC., formerly : 74 B 614-802
known as INTERSTATE DEPARTMENT : Inclusive
STORES, INC., et al., :

Debtors. :

-----x

AFFIDAVIT IN OPPOSITION TO TRUSTEES'
APPLICATION TO SUPPLEMENT RECORD ON
APPEAL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BRUCE R. ZIRINSKY, being duly sworn, deposes and says,
as follows:

1. I am an attorney at law admitted to practice before this court and am associated with the law firm of Weil, Gotshal & Manges, attorneys for California Wholesale Electric Company, formerly known as Esgro, Inc. (hereinafter referred to as "Esgro").

2. I submit this affidavit in opposition to the application of the Reorganization Trustees ("Trustees") for an order authorizing the supplementation of the record of an appeal currently pending before the United States Court of Appeals for the Second Circuit. California Wholesale Electric Company v. Crowley et al., Docket No. 76-5044.

3. On or about May 11, 1976, Irving Sulmeyer, who had been appointed Chapter XI receiver for Esgro in California, initiated an adversary proceeding in the New York Bankruptcy Court, pursuant to Chapter X Rule 10-601, against the Trustees in

order to obtain a modification of the stay of actions so as to permit the continued prosecution of an action and cross-action (hereinafter referred to as the "California Lawsuit"), pending in the Superior Court of the State of California, County of Los Angeles ("California Court").

4. In an order dated July 23, 1976, Bankruptcy Judge Edward J. Ryan modified the stay of actions so as to permit the continued prosecution of the California Lawsuit.

5. Thereafter, and on September 1, 1976, the order of Bankruptcy Judge Ryan was reversed by this court. The order of September 1, 1976, provided, inter alia, that (a) reference of the Chapter X cases to Bankruptcy Judge Ryan, to the extent of the determination of the Esgro claim, was revoked, and (b) a trial of the Esgro claim would be held before this court.

6. Thereafter, and on September 2, 1976, Esgro appealed to the Court of Appeals from the aforesaid order. The appeal was argued on October 14, 1976. Although the Court of Appeals has rendered no decision as to that appeal, upon a motion by Esgro for a stay of the District Court's order of September 1, 1976, the Court of Appeals, on November 23, 1976, entered an order which suspended and stayed the District Court's order of September 1, 1976 and directed the parties to proceed to trial in the California Court.

7. Prior to the Court of Appeals' November 23, 1976 decision, the Trustees filed a counterclaim against Esgro in the proceedings pending in this court.

8. Thereafter, Esgro filed a reply thereto with an amended proof of claim, based upon facts ascertained during the course of pre-trial discovery.

9. On November 24, 1976, an order was entered by

District Judge Lee P. Gagliardi granting the application of the Trustees to strike and dismiss the amended proof of claim.

10. On December 3, 1976, Esgro applied to the court for an order vacating its prior order of November 24, 1976, on the grounds that it was in contravention of the stay entered by the Court of Appeals on November 23, 1976. Esgro also requested that the court set forth the basis for said order.

11. By order dated December 15, 1976, the court denied Esgro's application to vacate the order of November 24, 1976, but amended said order so as to set forth the basis therefor.

12. Thereafter, and on December 27, 1976, Esgro appealed to the Court of Appeals from the aforesaid order. California Wholesale Electric Company v. Crowley et al., Docket No. 76-5044.

13. On or about January 23, 1977, Esgro transmitted the record on appeal to the clerk of the Court of Appeals in accordance with Fed. R. App. P. 11.

14. Relying on Fed. R. App. P. 10(e), the Trustees have applied to this court for leave to supplement the record on appeal. Specifically, the Trustees seek to include pleadings filed in and transcripts of, proceedings in the California Lawsuit. These matters were not part of the record in the District Court.

15. The Trustees reliance on Fed. R. App. P. 10(e) is misplaced, and, therefore, their application must be dismissed, since this court has no jurisdiction to adjudicate the issues raised therein.

16. Fed. R. App. P. 10(e) reads in relevant part as follows:

"If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth.... All other questions as to the form and contents of the record shall be submitted to the court of appeals." [Emphasis supplied].

17. In interpreting this rule one commentator has stated:

"Thus, all disputes as to what actually happened in the district court must be submitted to that court for resolution.... Illustrative of situations in which a party should seek correction of the record in the district court are: a conflict between the party's recollection of events and the record of those events in the reporter's transcript; the failure of the transcript to disclose events that the party contends occurred in the district court....

* * *

"The district judge's function and duty is performed [under Fed. R. App. P. 10(e)] when he settles as between the parties any differences that arise, not as to the completeness or fullness of the record, but as to whether any particular matter designated for inclusion in the record does, as far as it goes, truthfully state what occurred. [Quoting from William Howard Hay Foundation v. Safety Harbor Sanatorium, Inc. 141 F.2d 952 (5th Cir. 1944)]'."
 9 Moore's Federal Practice, ¶210.08[1] at 1639; 1643 (1975) [Emphasis supplied].

18. Since the Trustee's admittedly "seek permission to file certain papers ... where they will form a part of the record," [Affidavit of Daniel L. Carroll, February 14, 1977, at ¶5], Esgro submits that this court lacks the jurisdiction under Fed. R. App. P. 10(e) to determine this issue, since questions relating to the "contents of the record [must] be submitted to the court of appeals.

19. Assuming, arguendo, that pursuant to Fed. R. App. P. 10(e) this court possessed the jurisdiction to determine which documents should be contained in the record on appeal, the Trustees' application should be denied since Fed. R. App. P. 10(a) entitled "Composition of the Record on Appeal" specifically deliniates the only documents which may be included therein:

"The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases. "[Emphasis supplied].

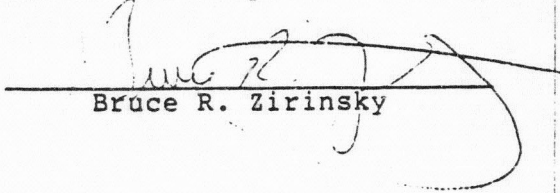
20. The interpretation of this rule is firmly established, in order to be included as part of the record on appeal the papers must have been "presented to the district court and filed in the record [in that court]...." 9 Moore's, Federal Practice, ¶210.04[1] at 1611 (1975).

21. Since the papers sought to be included were admittedly not filed in this court they are excluded under Fed. R. App. P. 10(a) from being part of the record on appeal to the Court of Appeals. In fact, the papers sought to be included were not even in existence when the court entered the order of November 24, the underlying order appealed from, since the California Lawsuit had not yet proceeded to trial.

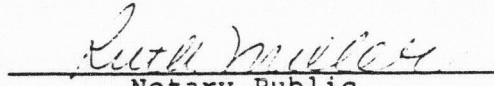
22. Moreover, the papers sought to be included by the Trustees are not probative of the issue raised in the appeal. Specifically, the primary issue before the Court of Appeals is whether this court's order of November 24, 1976, violates the stay order issued by the Court of Appeals on November 23, 1976, and, therefore, should be vacated. The introduction of papers and transcripts relating to the California Lawsuit can only serve to obfuscate this simple issue. Treatment of the California Court's actions should properly be left to the appellate courts of the

State of California as intended by the Court of Appeals in its stay order.

WHEREFORE, it is respectfully requested that the Trustees' application should be denied in all respects.


Bruce R. Zirinsky

Sworn to me this
17th day of February, 1977


Notary Public

New York

1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -X 74 B 614-802
:
In Re :
:
INTERSTATE STORES, INC., formerly : REPLY AFFIDAVIT
known as INTERSTATE DEPARTMENT :
STORES, INC., et al., :
:
Debtors. :
:
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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

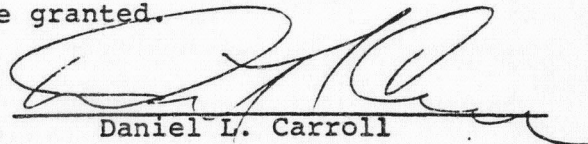
DANIEL L. CARROLL, being duly sworn, deposes and
says:

1. I am associated with the firm of Shea Gould
Climenko & Casey, attorneys for the Trustees of the debtors
involved in the above captioned proceeding. I make this
affidavit in support of the Trustee's application for an order
permitting them to supplement the record in this proceeding.
Specifically, I make this affidavit to reply to certain state-
ments made in the affidavit of Bruce R. Zirinsky, sworn to
February 17, 1977 and submitted in opposition to said applica-
tion.

2. Mr. Zirinsky, assuming that the Trustees are
relying upon Rule 10(e) of the Federal Rules of Appellate Pro-
cedure, argues that said Rule is inapplicable to the instant
application. First, the reference to Rule 10(e) was inserted
by the Clerk in the order to show cause signed by Judge Tenney
on February 14, 1977. The Trustees did not intend to rely
upon Rule 10(e).

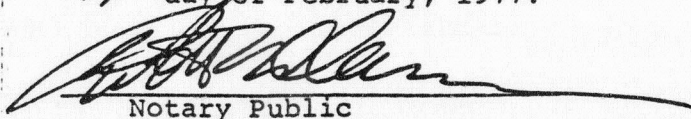
3. All the Trustees are seeking to do is to obtain the Court's permission to file certain documents in the District Court so that these documents can be made part of the record on appeal pursuant to Rule 10(a) of the Federal Rules of Appellate Procedure. Prior to making the application, we contacted Daniel Fusaro, Esq., Clerk of the Court of Appeals, who informed us that the proper procedure would be to make the application we are now making and said that the application should not be made to the Court of Appeals.

4. I respectfully submit that it is significant that Esgro is vigorously opposing the instant application. The brief it has filed with the Court of Appeals is, at best, misleading in that it tells only half of the story. Upon reading Esgro's brief no hint is given that Esgro made a motion to the California Superior Court to amend its pleadings in the California Proceeding, that said motion was denied by the California court and that the jury in the California Proceeding returned a verdict against Esgro in all respects. Such facts, I respectfully submit, are extremely pertinent to the appeal presently pending before the Court of Appeals and for that reason the instant application should be granted.


Daniel L. Carroll

Sworn to before me this

17 day of February, 1977.


Notary Public

ROBERT W. CARROLL
Notary Public, State of New York
No. 21-570077
Qualified in the County of
Columbia, New York, 1973

STATE OF NEW YORK)
 : SS.:
 COUNTY OF NEW YORK)

ROBERTA BIEBER , being duly sworn, deposes and says:
 that deponent is in the employ of Shea Gould Clivens & Casey,
 attorneys for the Trustees
 herein, is over 18 years of age, is not a party to this action, and
 resides at 165 West End Avenue, New York, New York.
 On the 17th day of February , 1977 , deponent served the within

Reply Affidavit

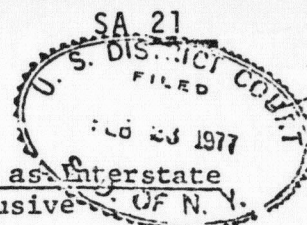
On Weill Gotshal & Manges Esq(s) ., attorney(s) for the
 Esgro, Inc.

in the within entitled action, by depositing a true and correct copy
 of the same, properly enclosed in a postpaid wrapper in the official
 depository maintained and exclusively controlled by the United States
 Government at 330 Madison Avenue, New York, New York 10017, that being
 the post office address of the attorneys for the Trustees
 directed to said attorney(s) for Esgro, Inc.
 at No. 767 Fifth Avenue, New York, New York
 that being the address designated by (~~him~~) (them) for that purpose.

Roberta Bieber

Subscribed and sworn to before me this
 17th day of February, 1977

Endorsement



In re Interstate Stores, Inc., formerly known as Interstate Department Stores, Inc., et al., 74 B 614-802 Inclusive

By memorandum endorsement entered on the record on November 24, 1976 this court granted the motion made by the Trustees to strike and dismiss the amended proof of claim filed by Esagro, Inc., in the above matter. On December 15, 1976 this court granted an application made by Esagro to the extent that it amended its order entered November 24 by issuing a memorandum decision which fully set forth the reasons for that order of dismissal. As noted in its December 15 decision, this court did not initially enter its decision to strike or the reasons therefor into the record because the decision was orally announced at a pre-trial conference on November 16, 1976, at which time the court expected to go to trial immediately and intended to dictate its decision into the trial record.

On December 9, 1976, following its decision to strike Esagro's amended proof of claim but before the entry of its decision specifying in full the reasons for that decision, this court spoke over the telephone to Judge Max Deutz, Superior Court of the State of California for Los Angeles County. The circumstances of that telephone conversation are set forth in the affidavit of Daniel L. Carroll, submitted in support of the Trustees' instant application. The conversation with Judge Deutz did not alter this court's previously announced decision to strike and dismiss Esagro's amended proof of claim in the above matter, nor did it affect the underlying rationale for the dismissal, as accurately and fully set forth in the decision of December 15, 1976.

However, in an excess of caution and in the interest of insuring that the record in the above case accurately reflect any and all matters which may have been before this court when it rendered its decision of December 15, the Trustees' instant application for an order permitting them to supplement the record is granted. See Rule 10(a) and (e), Fed. R. App. P.

Accordingly, it is the order of this court that the Trustees are permitted to file with the clerk of this court, and the clerk of this court is directed to receive for filing, the supplemental materials proposed by the Trustees in their present application.

So ordered.

A handwritten signature in ink, appearing to be "L. G. C.", written over a horizontal line. Below the line, the text "U.S.D.J." is printed.

U.S.D.J.

Dated: February 22, 1977
New York, N.Y.

GIBSON, DUNN & CRUTCHER
WESLEY G. HOWELL, JR.
ARTHUR L. SHERWOOD
515 South Flower Street
Los Angeles, California 90071
(213) 620-9300

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Attorneys for Defendants and
Cross-Complainants Esgro, Inc.
and Triumph Sales, Inc.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

WHITE FRONT STORES, INC., etc., et al.,

Plaintiffs,

vs.

ESGRO, INC., etc., et al.,

Defendants.

NO. C 50105

CROSS-COMPLAINT

ESGRO, INC., a corporation, and
TRIUMPH SALES, INC., a corporation,

Cross-Complainants,

vs.

WHITE FRONT STORES, INC., a California
corporation, WHITE FRONT COSTA MESA, INC.,
a Delaware corporation, WHITE FRONT DOWNEY,
INC., a Delaware corporation, WHITE FRONT
THOUSAND OAKS, INC., a Delaware corpora-
tion, WHITE FRONT SOUTH SACRAMENTO, INC.,
a Delaware corporation, WHITE FRONT LA
MESA, INC., a Delaware corporation, WHITE
FRONT OAKLAND, INC., a Delaware corpora-
tion, WHITE FRONT SAN JOSE, INC., a
Delaware corporation, WHITE FRONT SUNNY-
VALE, INC., a Delaware corporation, WHITE
FRONT SACRAMENTO, INC., a Delaware corpo-
ration, WHITE FRONT PLEASANT HILL, INC.,
a Delaware corporation, WHITE FRONT
FRESNO, INC., a Delaware corporation,
WHITE FRONT SOUTH SAN FRANCISCO, INC., a
Delaware corporation, WHITE FRONT NEWARK,
INC., a Delaware corporation, WHITE FRONT
RICHMOND, INC., a California corporation,
WHITE FRONT TACOMA, INC., a Washington
corporation, WHITE FRONT SEATTLE, INC.,
a Washington corporation, and WHITE FRONT
BURIEN, INC., a Washington corporation,
INTERSTATE DEPARTMENT STORES, INC., a
corporation, and DOES I through XXX,
inclusive,

Cross-Defendants.

1 Defendants and cross-complainants Esgro, Inc. and
2 Triumph Sales, Inc. complain of cross-defendants as follows:

3 FIRST CAUSE OF ACTION

4 1. Cross-complainants Esgro, Inc. and Triumph Sales,
5 Inc. are and at all times material herein have been California
6 corporations authorized to do and doing business in Los Angeles,
7 California.

8 2. Cross-complainants are informed and believe and on
9 that ground allege that White Front Tacoma, Inc., White Front
10 Seattle, Inc. and White Front Burien, Inc. are and at all times
11 material hereto have been Washington corporations doing business
12 in Los Angeles, California, that White Front Stores, Inc. and
13 White Front Richmond, Inc. are and at all times material hereto
14 have been California corporations doing business in Los Angeles,
15 California, that Interstate Department Stores, Inc., White Front
16 Costa Mesa, Inc., White Front Downey, Inc., White Front Thousand
17 Oaks, Inc., White Front South Sacramento, Inc., White Front La
18 Mesa, Inc., White Front Oakland, Inc., White Front San Jose, Inc.,
19 White Front Sunnyvale, Inc., White Front Sacramento, Inc., White
20 Front Pleasant Hill, Inc., White Front Fresno, Inc., White Front
21 San Francisco, Inc., and White Front Newark, Inc. are and at all
22 times material hereto have been Delaware corporations doing busi-
23 ness in Los Angeles, California.

24 3. Cross-complainants are unaware of the true names and
25 capacities of defendants Doe I through XXX, inclusive, who are,
26 therefore, sued herein by said fictitious names. Plaintiffs will
27 amend this Cross-Complaint to show their true names and capacities
28 when they are ascertained.

29 4. Cross-complainants are informed and believe and on
30 that ground allege that at all times material hereto cross-defendant
31 Interstate Department Stores, Inc. ("Interstate") and Does I through
32 X, inclusive, so controlled and manipulated the affairs of each and

1 all of the remaining corporate defendants that there existed and
2 exists identity of ownership and interest as between Interstate and
3 Does I through X, inclusive, on the one hand, and the remaining
4 corporate defendants on the other hand and to recognize the fiction
5 of separate corporate existence under the circumstances would
6 sanction fraud and promote injustice.

7 5. Cross-complainants are informed and believe and on
8 that ground allege that at all times material hereto cross-
9 defendants White Front Stores, Inc. and Does XI through XXX, inclu-
10 sive, so controlled and manipulated the affairs of each and all of
11 the remaining cross-defendants, except Interstate and Does I through
12 X, inclusive, that there existed and exists identity of ownership
13 and interest as between White Front Stores, Inc. and Does XI through
14 XXX, inclusive on the one hand, and the remaining cross-defendants,
15 except Interstate and Does I through X, inclusive, on the other hand
16 and to recognize the fiction of separate corporate existence under
17 the circumstances would sanction fraud and promote injustice.

18 6. Cross-complainants are informed and believe and on
19 that ground allege that each of the cross-defendants herein acted
20 as the agent of each other cross-defendant in the acts and omissions
21 complained of herein.

22 7. On or about December 1, 1970 cross-complainants and
23 White Front Stores, Inc. entered into an agreement in writing con-
24 cerning the license of and operation by cross-complainants of
25 residential interior departments in stores operated by White Front
26 Stores, Inc. Said written agreement was amended, in writing, on
27 several occasions between December 1970 and June 1972, and
28 separate agreements for certain White Front Stores in operation were
29 executed (said agreement of December 1, 1970 together with amendments
30 thereto and the separate store agreements are referred to herein-
31 after as "the agreement, as amended"), resulting, inter alia, in
32 the following:

1 (a) Francis J. Esgro was released and discharged
2 from all personal rights and obligations under certain
3 prior agreements, and cross-complainants Esgro, Inc. and
4 Triumph Sales, Inc. undertook and received the obligations
5 and rights of Francis J. Esgro pursuant to said prior
6 agreements;

7 (b) Cross-complainants or affiliated companies
8 were granted the right and license to operate liquor
9 departments and residential interior departments in
10 each and all of the stores operated by White Front
11 Stores, Inc. or its subsidiaries except for certain
12 specific stores as provided in said agreement, as
13 amended, (such stores where such right and license
14 were granted are hereinafter sometimes referred to
15 as the "White Front Stores"), for a term extending to
16 1987;

17 (c) Cross-complainants and cross-defendants agreed
18 to terminate cross-complainants' said liquor departments
19 only on certain terms and conditions.

20 8. Cross-complainants are informed and believe and on
21 that ground allege that sometime prior to December 1970, cross-
22 defendants came to the conclusion and decided to either sell or
23 close all or substantially all of the said White Front Stores and
24 further concluded and decided that should cross-defendants sell such
25 White Front Stores or any of them to another such sale would not be
26 made subject to the said agreement, as amended, between cross-
27 complainants and White Front Stores, Inc.

28 9. Continually since said conclusion and decision of
29 cross-defendants until November 1972 cross-defendants concealed and
30 omitted to disclose to cross-complainants their said intention,
31 conclusion and decision but rather represented to and assured cross-
32 complainants that the said White Front Stores would remain open

1 through the entire term of the said agreement, as amended, and also
2 that additional stores would be opened by cross-defendants which
3 stores would also become subject to the said agreement, as amended.

4 10. On or about December 1, 1970, in written amendments
5 to the said agreement dated December 1, 1970 and on several other
6 occasions and in connection with other amendments to the said agree-
7 ment subsequent thereto, cross-defendants falsely and fraudulently
8 represented to cross-complainants that the intention of cross-
9 defendants was only to sell a certain few of the White Front Stores
10 located in the Pacific Northwest states and to sell or close no
11 other White Front Stores than these. In connection with said written
12 amendments to the said agreement and in order to induce cross-
13 complainants to enter into said amendments to the said agreement
14 and to continue to operate departments in the said White Front
15 Stores, cross-defendants intentionally concealed and omitted to
16 disclose their real and true intentions, conclusions and determina-
17 tions, as alleged hereinabove.

18 11. Cross-complainants are informed and believe and on
19 that ground allege that in or before early October 1972 cross-
20 defendants determined and resolved to close and cease business in
21 a majority of the said White Front Stores.

22 12. Despite said determination and resolution and its
23 anticipated and expected severe and adverse effect on cross-
24 complainants' business, cross-defendants failed and refused to
25 disclose to cross-complainants such determination and resolution
26 but rather, in order to induce cross-complainants to continue to
27 operate departments in all of said White Front Stores until the
28 very day of such stores' closing without adequate or necessary
29 provisions being made for a closing, misrepresented to cross-
30 complainants that, among other things, the said White Front Stores
31 would continue operations and that there had been no resolution or
32 determination made that any of the said White Front Stores would be

1 closed.

SA 27

2 13. In reliance upon the truth of said misrepresentations,
3 cross-complainants continued operations in said White Front Stores
4 and did not make adequate or necessary provision for the closing of
5 the White Front Stores.

6 14. On or about December 15, 1973 cross-defendants
7 announced publicly and first informed cross-complainants that White
8 Front Stores, Inc. had resolved and determined to close twenty-one
9 of the thirty-three said White Front Stores and that such closings
10 would take place forthwith.

11 15. After the date on which cross-defendants had re-
12 solved and determined to close said stores but prior to December 15,
13 1972, in an attempt to avoid their obligations pursuant to the said
14 agreement, as amended, cross-defendants sent to cross-complainants
15 a document entitled "Notice of Default and Notice of Termination
16 of Occupancy" and soon thereafter a document entitled "Notice of
17 Termination of License Agreements." Said Notices purported to
18 claim that cross-complainants had breached their obligations to
19 cross-defendants in the said agreement, as amended, and purported
20 to exercise a right of cross-defendants to terminate the said
21 agreement, as amended.

22 16. Cross-complainants relied upon the truth of the said
23 misrepresentations of cross-defendants in continuing to expend
24 monies, time and effort in connection with the creation, openings
25 and operations of the said departments in the said White Front
26 Stores, which monies, time and effort would not have been expended
27 had cross-complainants known of the true intentions, determinations
28 and resolutions of cross-defendants with regard to the sale or
29 closing of the said White Front Stores.

30 17. Cross-defendants did, in fact, close said twenty-one
31 stores and as a result of the closing by cross-defendants of
32 twenty-one of the thirty-three said White Front Stores, cross-

1 complainants could not economically or adequately operate the said
2 departments in only the remaining twelve White Front Stores and
3 could not continue to operate said remaining departments with the
4 remaining threat of closure and cross-complainants were required
5 to cease and discontinue the operation of the said departments in
6 these remaining White Front Stores also.

7 18. As a direct and proximate result of the said mis-
8 representations and fraud of cross-defendants, cross-complainants
9 have been injured and damaged in an amount which is presently
10 uncertain, but which includes the losses and expenses incurred in
11 closing said departments and the lost future profits from the
12 anticipated operations of said departments, and cross-complainants
13 are informed and believe and on that ground allege that said
14 injury and damage exceeds the amount of \$30,000,000.00.

15 SECOND CAUSE OF ACTION

16 (Breach of Contract)

17 19. Cross-complainants incorporate by this reference the
18 allegations contained in Paragraphs 1 through 18, inclusive,
19 hereof as though set forth in full.

20 20. The said unilateral closing of twenty-one of thirty-
21 three said White Front Stores:

22 (a) Was in breach and a repudiation of the entire
23 said agreement, as amended;

24 (b) Prevented, frustrated and made impossible the
25 performance of cross-complainants pursuant to the agree-
26 ment, as amended, and wholly and completely frustrated
27 the objective, purpose and intent of cross-complainants
28 in connection with the said agreement, as amended, and
29 thereby constitutes a material and substantial breach by
30 cross-defendants of the said agreement, as amended;

31 (c) Was in breach of the implied contract obligation
32 of cross-defendants to cross-complainants to deal in good

1 faith and fairly.

2 21. Cross-complainants performed all acts to be performed
3 by them pursuant to the said agreement, as amended, except those
4 made impossible or excused by the acts of cross-defendants.

5 THIRD CAUSE OF ACTION

6 (Interference with Contractual Relations)

7 22. Cross-complainants incorporate by this reference
8 the allegations contained in Paragraphs 1 through 21, inclusive,
9 hereof as though set forth in full.

10 23. Cross-complainants are informed and believe and on
11 that ground allege that cross-defendants Interstate and Does I
12 through X, inclusive, unlawfully and improperly ordered, conspired
13 to, caused and induced the remaining cross-defendants to breach and
14 repudiate the said agreement, as amended, as aforesaid and that
15 cross-defendants Interstate and Does I through X, inclusive,
16 unlawfully and improperly interfered with the said contractual
17 relationships of cross-complainants.

18 FOURTH CAUSE OF ACTION

19 (Punitive Damages)

20 24. Cross-complainants incorporate by this reference
21 the allegations contained in Paragraphs 1 through 23, inclusive,
22 hereof as though set forth in full.

23 25. Cross-complainants are informed and believe and on
24 that ground allege that the said acts and omissions of cross-
25 defendants were done wilfully and maliciously and with the intent
26 to harm and injure cross-complainants and that, therefore, cross-
27 complainants are entitled to punitive and exemplary damages in the
28 amount of \$5,000,000.00.

29 FIFTH CAUSE OF ACTION

30 (Rescission)

31 26. Cross-complainants incorporate by this reference
32 the allegations contained in Paragraphs 1 through 21, inclusive,

1 hereof as though set forth in full.

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2 27. As a result of the misrepresentations and fraud of
3 cross-defendants, as alleged herein, and the mistake of cross-
4 complainants as to the true intentions, decisions and purposes of
5 cross-defendants, as alleged herein, and the mistake of cross-
6 complainants in believing that the subject matter of the said
7 agreement, as amended, i.e., the White Front Stores, would remain in
8 operation, the said agreement, as amended, should be rescinded
9 subject only to the payment of damages to cross-complainants as
10 sought in the remaining causes of action of this Cross-Complaint.

11 WHEREFORE, cross-complainants Esgro, Inc. and Triumph,
12 Sales, Inc. pray for judgment against cross-defendants and each of
13 them as follows:

14 1. For compensatory damages in the amount of
15 \$30,000,000.00, or as proven at trial, together with interest
16 thereon;

17 2.. For punitive and exemplary damages in the amount of
18 \$5,000,000.00;

19 3. For judgment of rescission as alleged in paragraph
20 27 of this Cross-complaint;

21 4. For costs of suit, including reasonable attorneys'
22 fees; and,

23 5. For such other and further relief as is just.

24 DATED: 1973.

25 GIBSON, DUNN & CRUTCHER

26
27 By _____
28 Arthur L. Sherwood
29 Attorneys for Defendants and
30 Cross-complainants Esgro, Inc.
31 and Triumph Sales, Inc.
32

(PROOF OF SERVICE BY MAIL - 1013a, 1015.5 C.C.P.)

LYNNE DEE MILLER certifies as follows:

I am an active member of the State Bar of California and am not a party to this action; my business address is 515 South Flower Street, City and County of Los Angeles, State of California; on the 27th day of July, A.D., 19 73, I served the within

CROSS-COMPLAINT

on the _____ plaintiffs in this action, by placing a true copy thereof in an envelope addressed as follows:

Robert Holtzman, Esq.
Loeb & Loeb
One Wilshire Boulevard
Los Angeles, CA 90017

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the mail at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on July 27, 19 73, at
Los Angeles, California.

Lynne D Miller
Declarant

GIBSON, DUNN & CRUTCHER
 WESLEY G. HOWELL, JR.
 ARTHUR L. SHERWOOD
 515 South Flower Street
 Los Angeles, California 90071
 Telephone: (213) 488-7000

Attorneys for Defendant and
 Cross-Complainant Esgro, Inc.
 (now known as California Wholesale
 Electric Company)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

WHITE FRONT STORES, INC., etc., et al.,)

Plaintiffs,)

v.)

ESGRO, INC., etc., et al.,)

Defendants.)

ESGRO, INC. (now known as "California
 Wholesale Electric Company"),
 a corporation,

Cross-Complainant,

v.

WHITE FRONT STORES, INC., a California
 corporation, WHITE FRONT COSTA MESA,
 INC., a Delaware corporation, WHITE
 FRONT DOWNEY, INC., a Delaware corpora-
 tion, WHITE FRONT THOUSAND OAKS, INC.,
 a Delaware corporation, WHITE FRONT
 SOUTH SACRAMENTO, INC., a Delaware
 corporation, WHITE FRONT LA MESA, INC.,
 a Delaware corporation, WHITE FRONT
 OAKLAND, INC., a Delaware corporation,
 WHITE FRONT SAN JOSE, INC., a Delaware
 corporation, WHITE FRONT SUNNYVALE,
 INC., a Delaware corporation, WHITE
 FRONT SACRAMENTO, INC., a Delaware
 corporation, WHITE FRONT PLEASANT HILL,
 INC., a Delaware corporation, WHITE
 FRONT FRESNO, INC., a Delaware corpo-
 ration, WHITE FRONT SOUTH SAN FRANCISCO,
 INC., a Delaware corporation, WHITE
 FRONT NEWARK, a Delaware corporation,
 WHITE FRONT RICHMOND, INC., a
 California corporation, WHITE FRONT
 TACOMA, INC., a Washington corporation,
 WHITE FRONT SEATTLE, INC., a Washington
 corporation and WHITE FRONT BURIEEN,
 INC., a Washington corporation and
 INTERSTATE STORES, INC., a corporation,

Cross-Defendants.

NO. C 50105

FIRST AMENDED CROSS-
 COMPLAINT FOR FRAUD,
 MISREPRESENTATION,
 BREACH OF CONTRACT,
 INTERFERENCE WITH
 CONTRACTUAL RELATIONS
 AND PROSPECTIVE
 ADVANTAGE AND
 RESCISSION

1 Defendant and cross-complainant California Wholesale
2 Electric Company (formerly known as "Esgro, Inc.," and herein-
3 after referred to as "Esgro") complains of cross-defendants and
4 each of them, directly and through their Trustees, and alleges
5 as follows:

6 FIRST CAUSE OF ACTION

7 (Fraud and Misrepresentation)

8 1. Cross-complainant Esgro is and at all times
9 material herein has been, a California corporation authorized to
10 do and doing business in Los Angeles, California.

11 2. Esgro is informed and believes and on that ground
12 alleges that White Front Tacoma, Inc., White Front Seattle, Inc.
13 and White Front Burien, Inc. are and at all times material hereto
14 have been Washington corporations doing business in Los Angeles,
15 California, that White Front Stores, Inc. and White Front
16 Richmond, Inc. are and at all times material hereto have been
17 California corporations doing business in Los Angeles, California,
18 that Interstate Stores, Inc., White Front Costa Mesa, Inc., White
19 Front Downey, Inc., White Front Thousand Oaks, Inc., White Front
20 South Sacramento, Inc., White Front La Mesa, Inc., White Front
21 Oakland, Inc., White Front San Jose, Inc., White Front Sunnyvale,
22 Inc., White Front Sacramento, Inc., White Front Pleasant Hill,
23 Inc., White Front Fresno, Inc., White Front South San Francisco,
24 Inc. and White Front Newark, Inc. are and at all times material
25 hereto have been Delaware corporations doing business in Los
26 Angeles, California and that each and all of said cross-defendants
27 are now debtors in proceedings pending in the Bankruptcy Court
28 of the United States District Court for the Southern District of
29 New York with Joseph R. Crowley and Herbert Siegel acting as
30 trustees therein (the "Trustees").

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1 3. Esgro is informed and believes and on that ground
2 alleges that at all times material hereto cross-defendant
3 Interstate Stores, Inc. ("Interstate"), so controlled and
4 manipulated the affairs of each and all of the remaining corporate
5 defendants that there existed and exists identity of ownership
6 and interest as between Interstate on the one hand, and the
7 remaining corporate defendants on the other hand and to
8 recognize the fiction of separate corporate existence under the
9 circumstances would sanction fraud and promote injustice.

10 4. Esgro is informed and believes and on that ground
11 alleges that at all times material hereto cross-defendant White
12 Front Stores, Inc. so controlled and manipulated the affairs
13 of each and all of the remaining cross-defendants, except
14 Interstate, that there existed and exists identity of ownership
15 and interest as between White Front Stores, Inc. on the one hand,
16 and the remaining cross-defendants, except Interstate, on the
17 other hand, and to recognize the fiction of separate corporate
18 existence under the circumstances would sanction fraud and
19 promote injustice.

20 5. Esgro is informed and believes and on that ground
21 alleges that each of the cross-defendants herein acted as the
22 agent of each other cross-defendant in the acts and omissions
23 complained of herein.

24 6. On or about December 30, 1970, Esgro and cross-
25 defendants entered into an agreement in writing dated as of
26 December 1, 1970 concerning the license of and operation by
27 Esgro of Residential Interior Departments in "White Front" stores
28 operated by cross-defendant. Said written agreement was amended,
29 in writing, on several occasions between December 1970 and
30 June 1972, and a form separate agreement for individual White
31 Front stores was agreed upon whereby, inter alia, Esgro and
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1 affiliated companies were granted the right and license to
 2 operate Residential Interior Departments in each and all of the
 3 White Front stores operated by cross-defendants except for
 4 certain specific stores (such stores where such right and
 5 license were granted are hereinafter sometimes referred to as
 6 the "White Front Stores"), for a term extending to 1987. Said
 7 agreement of December 1970 together with amendments thereto and
 8 the separate store agreements are referred to hereinafter as the
 9 "agreement" and a copy of the said agreement, as amended, is
 10 attached hereto and incorporated herein by this reference and
 11 labeled as Exhibit "1".

12 7. During the course and as a part of the negotiations
 13 between Esgro and cross-defendants with respect to the said
 14 agreement, cross-defendants represented to and assured Esgro,
 15 among other things, that the White Front Stores and the "White
 16 Front" division of cross-defendant Interstate were healthy and (1) *Green*
 17 profitable and that cross-defendants fully intended to maintain (2) *Green*
 18 and expand their chain of White Front stores during the full term
 19 of the said Residential Interior Agreement. In addition, in
 20 connection with the said negotiations, cross-defendants
 21 represented to and assured Esgro that cross-defendant Interstate
 22 was not in danger of financial difficulty and had a net worth of (3) *Green*
 23 approximately \$79 million. In addition, during and throughout
 24 1970 and thereafter, the cross-defendants published and made
 25 public financial statements of Interstate reporting the operations
 26 of Interstate (and all of its subsidiaries) on a fully (4) *Green*
 27 consolidated basis, which showed a net worth of approximately
 28 \$79 million and which did not note or indicate any financial
 29 difficulty of the White Front Stores or their operations.

30 8. Esgro reasonably relied upon said representations,
 31 assurances and published financial statements of cross-defendants
 32

1 in entering into the said agreement and in making and undertaking
2 its extensive commitments and obligations in connection therewith.

3 9. From and after the execution of the said agreement,
4 up until at least November 1972, cross-defendants continually
5 represented to and assured Esgro that the "White Front" operation
6 was a profitable and ongoing business and was not suffering from
7 or incurring any undue financial difficulties. In addition,
8 cross-defendants, during this period of time, assured and
9 represented to Esgro that they were not considering the closing
10 of any of the White Front Stores. *never*

11 10. Esgro reasonably relied upon said assurances and
12 representations in connection with making its investments in
13 time, money and effort to construct, establish and stock its
14 Residential Interior Departments. Esgro did, in fact, pursuant
15 to said agreement, construct, establish and stock Residential
16 Interior Departments in 33 separate White Front Stores located
17 throughout the States of California, Oregon and Washington and
18 constructed, established and stocked three separate warehouses
19 in support thereof.

20 11. The said representations and assurances of cross-
21 defendants, and each and all of them, were false and untrue and
22 cross-defendants knew or should have known of such falsity and
23 lack of truth in that, among other things:

24 (a) As of December 1970 (i.e., at or about the
25 time of execution of the said agreement), and all times thereafter
26 and for a substantial period of time prior thereto, the White
27 Front division of Interstate was incurring increasingly severe
28 operating losses and had become unprofitable;

29 (b) The internal operating statements for the
30 White Front division of Interstate prepared by and available to

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1 cross-defendants at and just before the said agreement was signed
 2 showed operating results for the first nine months of the then
 3 current fiscal year as a loss of approximately \$6,325,000 (before
 4 allocation of New York office overhead and provision for Federal
 5 income tax);

6 (c) The White Front division of Interstate was,
 7 at and just before the said agreement was signed, expected by
 8 cross-defendants to incur a loss in excess of \$5 million for the
 9 fiscal year ending January 31, 1971 and it did incur a loss in
 10 excess of \$5 million for that fiscal year;

11 (d) It should have been or was clear to cross-
 12 defendants beginning sometime prior to December 1970, that the
 13 financial operations and results of the White Front Stores were
 14 so bad and deteriorating so steadily and rapidly that a sub-
 15 stantial number (if not all) of said White Front Stores would
 16 have to be closed or sold;

17 (e) At the time of execution of the said agreement,
 18 Interstate did not have a net worth of approximately \$79 million.
 19 Interstate's net worth was substantially below that sum and
 20 Interstate knew or should have known of substantial financial
 21 problems which it was incurring and which it would and did incur.

22 12. Cross-defendants did not disclose to Esgro or
 23 anyone else and instead concealed and omitted to disclose the
 24 poor financial results of the White Front operations and the
 25 facts and matters set forth in paragraph 11 hereof. As a result,
 26 representations and assurances made to Esgro in connection with
 27 the said agreement and Esgro's establishment and maintenance of
 28 its Residential Interior Departments were false and misleading
 29 and the financial results of Interstate reported to Esgro and
 30 to the public were false and misleading.

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1 13. Continually up until mid-December 1972, cross-
2 defendants concealed and failed to disclose to Esgro their
3 intention to close all or substantially all of the White Front.
4 Stores and, to the contrary, affirmatively represented to and
5 assured Esgro that such stores would remain open through the
6 entire term of the said agreement.

7 14. In reliance upon the truth of said misrepre-
8 sentations made to Esgro and on the failure by cross-defendants
9 to reveal the true facts, Esgro continued operations in said
10 White Front Stores and did not make adequate or necessary
11 provisions for the closing of said stores.

12 15. On or about November 19, 1972, Esgro first learned
13 of the true intentions of cross-defendant with respect to White
14 Front Stores closings and, in order to minimize and mitigate its
15 losses and damages, Esgro determined to close its Residential
16 Interior Departments and informed cross-defendants of such
17 determination.

18 16. On or about December 12, 1973, cross-defendants
19 announced publicly (and thereby informed Esgro) that they had
20 resolved and determined to close 21 of the 33 said White Front
21 Stores and that such closings would take place in approximately
22 one month.

23 17. Cross-defendants did, in fact, close each and all
24 of the said White Front Stores by mid-1974.

25 18. Had Esgro known the true facts concerning the
26 financial status of the White Front operation and of Interstate
27 or their intentions, Esgro would not have entered into the said
28 agreement and would not have established, maintained or operated
29 its Residential Interior Departments.

30 ///

31 ///

32 ///

1 19. As a direct and proximate result of the said acts
2 and conduct of cross-defendants, and each of them, Esgro has been
3 injured and damaged in the following approximate amounts:

4 (a) In the amount of \$2,300,000 as a result of
5 expenses incurred and monies lost in connection with the
6 construction and establishment of the Residential Interior
7 Departments and the three warehouses in connection therewith;

8 (b) In the amount of \$2,200,000 as the loss
9 incurred in liquidating Esgro's Residential Interior Departments
10 inventory, including handling expenses therefor;

11 (c) In the amount of \$2,300,000 as the book loss
12 incurred by Esgro as a part of its operational start-up cost of
13 establishing its Residential Interior Departments;

14 (d) In the amount of \$24 million as lost reasonably
15 anticipated profits from operations by Esgro of its Residential
16 Interior Departments during the term of the said agreement;

17 (e) In the amount of \$3,200,000 as lost reasonably
18 anticipated profits under the portion of said agreement providing
19 for the supply, by Esgro, to cross-defendants of electrical and
20 plumbing products;

21 (f) In the amount of \$5 million as additional
22 general damages;

23 (g) In an amount which is, as yet, undetermined
24 for costs, interest and attorneys' fees incurred herein and in
25 connection with associated litigation.

26 20. Esgro is informed and believes and on that ground
27 alleges that the said acts and omissions of cross-defendants were
28 done willfully and maliciously and with the intent to harm and
29 injure Esgro and that, therefore, Esgro is entitled to punitive
30 and exemplary damages in the amount of \$5 million.

31 ///

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SECOND CAUSE OF ACTION

(Breach of Contract)

21. Esgro incorporates by this reference the allegations contained in Paragraphs 1 through 19, inclusive, hereof as though set forth in full.

22. The said unilateral closing of said White Front Stores by cross-defendants:

(a) Was in breach and a repudiation of the entire said agreement;

(b) Prevented, frustrated and made impossible the performance of Esgro pursuant to the said agreement and wholly and completely frustrated the objective, purpose and intent of Esgro in connection with the said agreement and thereby constituted a material and substantial breach by cross-defendants of the said agreement;

(c) Was in breach of the implied contract obligation of cross-defendants to Esgro to deal in good faith and fairly.

23. Esgro performed all acts to be performed by it pursuant to the said agreement, except those made impossible or excused by the acts of cross-defendants.

THIRD CAUSE OF ACTION

(Interference with Contractual

Relations and Prospective Advantage)

24. Esgro incorporates by this reference the allegations contained in Paragraphs 1 through 23, inclusive, hereof as though set forth in full.

25. Cross-defendant Interstate unlawfully and improperly ordered, conspired to, caused and induced the remaining cross-defendants to breach and repudiate the said agreement as alleged

///

///

1 herein and cross-defendant Interstate unlawfully and improperly
2 interfered with the said contractual relationships of Esgro and
3 prevented and interfered with a prospective advantageous business
4 advantage of Esgro in the operation of its Residential Interior
5 Departments.

6 FOURTH CAUSE OF ACTION

7 (Rescission)

8 26. Esgro incorporates by this reference the
9 allegations contained in Paragraphs 1 through 23, inclusive,
10 hereof as though set forth in full.

11 27. As a result of the misrepresentations and fraud
12 of cross-defendants, as alleged herein, and the mistake of Esgro
13 as to the true facts, intentions, decisions and purposes of
14 cross-defendants, as alleged herein, and the mistake of Esgro
15 in believing that the subject matter of the said agreement (i.e.,
16 that White Front Stores were profitable and would remain in
17 operation), the said agreement should be rescinded subject only
18 to the payment of damages to Esgro as sought in the preceding
19 causes of action of this Cross-Complaint.

20 WHEREFORE, cross-complainant Esgro prays for judgment
21 against cross-defendants and their Trustees and each of them
22 as follows:

23 1. For compensatory damages in the amount of \$39
24 million, or as proven at trial, together with interest
25 thereon;

26 2. For punitive and exemplary damages in the
27 amount of \$5 million;

28 3. For judgment of rescission as alleged in
29 Paragraph 27 of this Cross-Complaint;

30 ///

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1 4. For costs of suit, including reasonable attorneys'
2 fees; and

3 5. For such other and further relief as is just.

4 DATED: November 29, 1976.

5 GIBSON, DUNN & CRUTCHER

6
7 By Arthur L. Sherwood

8 Attorneys for Defendant and
9 Cross-Complainant
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 54

HON. MAX F. DEUTZ, JUDGE

WHITE FRONT STORES, INC., et al.,

Plaintiffs,

vs.

ESGRO, INC., et al.,

Defendants.

No. C 50105

ESGRO, INC., et al.,

Cross-Complainants,

vs.

INTERSTATE DEPARTMENT STORES, INC.,
et al.,

Cross-Defendants.

REPORTER'S PARTIAL TRANSCRIPT

Monday, December 6, 1976

RICHARD B. COLBY, CSR No.1080
Official Reporter

1 APPEARANCES:

2
3 For Plaintiffs and
4 Cross-Defendants:LOEB & LOEB
By: ROBERT A. HOLTZMAN
1 Wilshire Boulevard
Los Angeles, California 90017
[213] 627-42416 BALL, HUNT, HART, BROWN & BAERWITZ
By: JOSEPH A. BALL
120 Linden Avenue
Long Beach, California 90801
[213] 435-56319 SHEA, GOULD, CLIMENKO & CASEY
By: DANIEL L. CARROLL
330 Madison Avenue
New York, New York 10017
[212] 661-320012
13 For Defendants and
14 Cross-Complainants:GIBSON, DUNN & CRUTCHER
WESLEY G. HOWELL, JR.
ARTHUR L. SHERWOOD
By: ARTHUR L. SHERWOOD
515 South Flower Street
Los Angeles, California 90071
[213] 488-7000

1 LOS ANGELES, CALIFORNIA, MONDAY, DECEMBER 6, 1976

2 A.M. SESSION

3
4 (The following proceedings were had in
5 chambers:)

6 THE COURT: Let the record show that we have had a
7 prolonged discussion about the question of filing an amended
8 cross-complaint, and the cross-complainant has proffered a
9 motion for leave to file a first amended complaint, memorandum
10 in support and the declaration of Arthur L. Sherwood in
11 support of motion to file first amended complaint, and
12 proposed order re filing of first amended complaint.

13 The cross-defendant White Front has filed a
14 memorandum of points and authorities in opposition to the
15 motion for leave to file first amended complaint and a
16 declaration of Daniel L. Carroll in opposition, and a declara-
17 tion of Daniel L. Carroll in opposition for leave to file
18 amended complaint.

19 The court has read and considered all of the
20 memoranda and the proposed pleadings. We have had an extensive
21 discussion off the record in chambers on the matter and the
22 court has indicated his opinion that there are certain problems
23 in connection with this proposed amended cross-complaint which
24 are pretty much as follows: First of all, I think the
25 pleading is defective in that it does not specify the precise
26 elements of fraud which are required in a fraud action, the
27 precise fraudulent acts and misrepresentations. That I am
28 not too concerned with because I think that could be amended

1 to take care of that particular situation. But the things
2 that concern the court the most are the fact that there is
3 pending in the District Court of New York a bankruptcy
4 proceeding involving Interstate Stores and White Front Stores,
5 and that in those proceedings there is a claim filed which is
6 substantially the same as the original cross-complaint filed
7 in this action, and that there was a motion to file an amended
8 cross-complaint in the bankruptcy court which would have been
9 virtually identical to what is proposed to be the amended
10 cross-complaint to be filed in this court, and the court in
11 New York struck the amended claim and, consequently, that is
12 not a matter of record before the bankruptcy court.

13 At or about the same time leave has been granted
14 by the court in New York to proceed in a civil trial in
15 California. It is my feeling that the civil trial in California
16 must be tried within the parameters of the claim filed in
17 New York because it appears to me that the leave to proceed
18 in California is a circumscribed leave to proceed with the
19 idea that the proceedings in California would not go beyond
20 the proceedings in the bankruptcy court in New York. And for
21 that reason I think it would be improper to go forward with
22 an amended cross-complaint in California.

23 Now that particular issue may be resolved, as we
24 know, by the motion to reconsider an order to show cause, as
25 I understand it, in New York that is to be heard tomorrow at
26 5 p.m. And probably on Wednesday we will know what transpired
27 there.

28 If the court in New York permits the filing of an

1 amended claim in New York, then perhaps that would enlarge
2 the parameters of what the court in California could consider.

3 And then lastly, we come down to the question of
4 whether or not the proceedings in California as proposed under
5 the amended cross-complaint would induce new and entirely
6 different issues into the California proceeding on the eve
7 of trial. The initial allegations in California in the cross-
8 complaint are that there was fraud, there was breach of
9 contract, and there was interference with contract.

10 But we are concerned only at this point with the
11 fraud allegation and the fraud allegations in the cross-
12 complaint, original cross-complaint, are that the plaintiffs
13 and cross-defendants failed to disclose to the cross-
14 complainants at the time their contract was entered into in
15 1970 that they proposed to close down certain of their stores.
16 And the cross-complaint alleges that had the cross-complainants
17 known of this fact, they would not have entered into a con-
18 tract for the putting of franchised interior decorating, or --

19 MR. HOWELL: Residential interiors.

20 THE COURT: Residential interior units into the various
21 White Front Stores.

22 Now it is proposed in the amended cross-complaint
23 that they allege that there was affirmative fraud on the part
24 of the cross-defendants by deliberate misrepresentations as
25 to the financial condition of the White Front Stores, and
26 that the cross-defendants were misled by the deliberate
27 misrepresentations as to financial condition.

28 I am of the view, and as argued by counsel for

1 the cross-defendants, that this induces an entirely new cause of
2 action for fraud independent and apart from the cause of
3 action alleged in the original cross-complaint for failure
4 to disclose an intent to close certain of the White Front
5 Stores.

6 I realize there is a certain interrelation of
7 evidence between the two sets of allegations of fraud, but,
8 nevertheless, I can't help but feel that the alleged allega-
9 tion of positive misrepresentations which would then be
10 presented to the jury under the amended cross-complaint would
11 be substantially prejudicial to the cross-defendants.

12 MR. HOWELL: We have had a long discussion and I don't
13 want to burden the record any more than necessary. But there
14 are a couple of things I need to say.

15 You indicated that you thought the complaint was
16 defective because it didn't allege fraud with sufficient
17 specificity. But you weren't very concerned about that.

18 If that is one of the reasons for your ruling, we
19 probably ought to file --

20 THE COURT: I am not making that as a basis of my
21 ruling.

22 MR. HOWELL: Okay. Fine.

23 THE COURT: Because, as I say, I think if that were all
24 there were to it, that would be a mechanical proceeding, and
25 as long as the parties were sufficiently apprised, they could
26 proceed with the trial and an amendment could be made that
27 might survive another demurrer.

28 MR. HOWELL: One other comment. You indicated that at

1 or about the time that the amended proof of claim was stricken
2 in New York we were directed to proceed to trial out here.
3 In fact, we were directed by the Second Circuit to proceed
4 out here prior to the time that Judge Gagliardi's order was
5 filed in New York, for whatever difference that makes. I
6 won't argue it any further.

7 MR. CARROLL: But five days after it was signed by
8 Judge Gagliardi.

9 MR. HOWELL: That's right. It was signed, apparently,
10 or dated the 17th.

11 THE COURT: Which order are you referring to?

12 MR. HOWELL: The one striking the amended proof of
13 claim.

14 So at the time the Second Circuit ruled on the
15 question of where the case should be tried, there was an
16 amended proof of claim on file which had not yet been stricken.

17 MR. BALL: What was the date the Second Circuit ruled?

18 MR. HOWELL: The 23rd.

19 MR. BALL: And the motion to strike was the 17th?

20 MR. HOWELL: It was dated the 17th and filed the 25th.

21 MR. HOLTZMAN: Heard on the 16th, signed on the 17th,
22 filed on the 24th.

23 MR. BALL: The amended proof of claim was filed on
24 November 1st. It was stricken by order of the Federal district
25 judge on the 17th.

26 MR. SHERWOOD: It was dated the 17th.

27 THE COURT: It was dated the 17th and filed the 24th.
28 Now we can presume that there is some possibility of

1 communication between the District and Circuit Court up there
2 that the Circuit Court knew of this action.

3 MR. BALL: And the order was made on the 17th, accord-
4 ing to this.

5 MR. HOWELL: I just wanted to make it clear what the
6 facts were.

7 THE COURT: All right.

8 MR. HOWELL: There was one other thing. With respect
9 to your comments that a new cause of action has been inter-
10 jected, and so on, I won't argue again all the things or all
11 the points I have already made. But I would like to put on
12 the record the fact that we have indicated that we are pre-
13 pared to allow them whatever time they need to conduct
14 additional discovery.

15 The court made a suggestion that we might post-
16 pone the trial for a week to permit them to conduct discovery.
17 It is all right with us, but it is rejected by counsel for
18 the trustees.

19 MR. CARROLL: May I say something on that? We have not
20 rejected it. I think our position must be made clear on the
21 record also.

22 There is a tremendous amount of pressure to have
23 this claim adjudicated somewhere. We have been pushing for
24 this for six months, over six months. It is costing the
25 estate a tremendous amount of money every week it is not
26 adjudicated in interest costs, and that is why we want to have
27 this case tried as soon as possible.

28 MR. HOWELL: I appreciate that problem.

1 THE COURT: And I think you indicated that this proceed-
2 ing was the only thing that was holding up the closing of the
3 bankruptcy estate.

4 MR. CARROLL: The formulation and plan of reorganization.

5 MR. HOWELL: They have not formulated a plan, so it is
6 not holding up the closing.

7 But, in any event --

8 MR. BALL: But this is the only thing that holds up the
9 plan.

10 MR. HOWELL: In any event, we have made and we will
11 make again the offer to make Mr. Esgro available any time you
12 want him, weekends, or whatever, for his deposition. And we
13 will allow you any time you want. But we are also ready to
14 proceed to trial now.

15 THE COURT: I think the record should also show that
16 Mr. Ball has indicated that he is not in a position, because
17 of his trial commitments, to delay the proceeding long enough,
18 even a week, to go ahead with any additional discovery at
19 this late date. And I realize that there is a great contro-
20 versy as to the extent to which the cross-defendants were
21 aware of the potential claim by the cross-complainants. But
22 it is a very hazy record of misunderstandings or possible
23 misunderstandings between the parties as to whether or not
24 they actually were aware of the charges to be made and,
25 furthermore, the fact that there has yet never been set forth
26 in the pleadings, or otherwise, the precise nature of the
27 misrepresentations which the plaintiff is alleging is fraud
28 except to the extent that they have indicated that someone

1 among a group of several who were in the negotiations made
2 the representation that White Front had assets of some
3 \$79 million and possibly that they allege that someone made
4 a representation that a profit had been made in the past year
5 when, in fact, it appears that there had been a substantial
6 loss. Is that a fair statement?

7 MR. HOWELL: I think that it is generally fair. We do
8 believe that the pleadings, the interrogatories and the
9 depositions that have been taken do disclose to counsel for
10 the trustees everything they need to know in order to defend.
11 But I suppose those documents can speak for themselves and
12 I don't need to reargue it.

13 The only reason I raised the other point is
14 I don't think there is anything in the record to show that
15 we are agreeable to making Mr. Esgro available or postpone the
16 trial, or whatever else. I won't reargue what is set forth
17 in the declarations.

18 MR. HOLTZMAN: Even his offer of Mr. Esgro's deposition
19 would be insufficient. Esgro has made reference in our
20 discussions to other participants in these conversations,
21 Mr. Riesner, Mr. Cantor, Mr. Epstein, and some of these have
22 no present connection whatsoever with the trustees or the
23 company. They are not control witnesses. They are in other
24 parts of the country. In some instances locations aren't
25 even known.

26 The offer of Mr. Esgro's deposition would not
27 solve the problem of traveling around the country trying to
28 find or make arrangements to take depositions of these other

1 witnesses.

2 THE COURT: I think in order to make the record clear,
3 it appears to the court that all Mr. Esgro's deposition would
4 do would be to specify the charges as to the particular
5 statements allegedly made by these other individuals, and
6 then thereafter it would be necessary to locate the other
7 individuals who are no longer in the employ of White Front or
8 Interstate and to take their depositions as to their versions
9 of the conversations.

10 So it would be an ongoing proposition that might
11 be very time-consuming.

12 MR. HOWELL: Just so the record is clear, we are talking
13 about certain individuals, Mr. Cantor, who is, I still believe,
14 a consultant to Interstate.

15 MR. CARROLL: He is available.

16 MR. HOWELL: He is clearly under the control.
17 Mr. Epstein, who lives in Los Angeles and has been deposed,
18 and has agreed at least in the past to meet voluntarily with
19 counsel for the trustees by themselves. Mr. Craig has been
20 deposed. Mr. Riesner has not been deposed by anybody because
21 no one was able to find him. But efforts were made.

22 THE COURT: Mr. Craig's deposition did not touch on any
23 of the points that are presently being raised?

24 MR. HOWELL: Yes, it did.

25 MR. CARROLL: Mr. Craig lives in New York.

26 MR. HOWELL: I took the deposition and it did touch on
27 what the conversations were that took place.

28 MR. SHERWOOD: I think the record also ought to reflect

1 that it has been our position that these subjects that we
2 are talking about depositions on were subjects that were
3 relevant under the initial pleadings in any event.

4 THE COURT: Collaterally, yes, they may be relevant to
5 some of them as to the question of whether or not White Front
6 intended to close those stores at the time they made the
7 contract. But there is the additional element being charged
8 here now of deliberate fraudulent misrepresentations, and
9 that has not been an element of the proceedings up to the
10 present time. That is the thing that concerns the court the
11 most.

12 Okay. I will see you at 1:30.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPT. NO. 54

HON. MAX F. DEUTZ, JUDGE

WHITE FRONT STORES, INC., et al.,

Plaintiffs,

vs.

ESGRO, INC., et al.,

Defendants.

ESGRO, INC., et al.,

Cross-Complainants,

vs.

INTERSTATE DEPARTMENT STORES, INC.,
et al.,

Cross-Defendants.

STATE OF CALIFORNIA)

) ss.

COUNTY OF LOS ANGELES)

I, Richard B. Colby, CSR, Official Reporter of
the Superior Court of the State of California, for the County
of Los Angeles, do hereby certify that the foregoing pages
1 through 10 comprise a true and correct partial
transcript of the proceedings held in the above-entitled
matter on Monday, December 6, 1976.

Dated this 9th day of December 19 76.

/s/ Richard B. Colby CSR No. 1080
Official Reporter

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WHITE FRONT STORES, INC., et al.,
Plaintiffs,
vs.

ESGRO, INC., et al.,
Defendants.

No. C 50105

ESGRO, INC., et al.,
Cross-Complainants,
vs.

INTERSTATE DEPARTMENT STORES, INC.,
et al.,
Cross-Defendants.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Max F. Deutz, Judge of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the above-entitled case was heard by me in Department 54 on December 6, 1976.

That JOHN J. CORCORAN is the Acting County Clerk of the County of Los Angeles, and Clerk of the Superior Court of the State of California, for the County of Los Angeles;

That as such acting clerk of the county and of the court he has custody of all of the official records of said court, including the minutes of the above-entitled case.

IN WITNESS WHEREOF, I have hereunto set my hand in my official capacity this 9th day of December 1976.

MAX F. DEUTZ
Judge

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

1
2 WHITE FRONT STORES, INC., et al.,)
3 Plaintiffs,)
4 vs.)
5 ESGRO, INC., et al.,)
6 Defendants.) C 50105
7 ESGRO, INC., et al.,)
8 Cross-Complainants,)
9 vs.)
10 INTERSTATE DEPARTMENT STORES, INC.,)
11 et al.,)
12 Cross-Defendants.)

11 STATE OF CALIFORNIA)
12) ss.
13 COUNTY OF LOS ANGELES)

14 I, JOHN J. CORCORAN, Acting County Clerk of the County
15 of Los Angeles, State of California, and Acting Clerk of the
16 Superior Court of the State of California, for the County of
17 Los Angeles, DO HEREBY CERTIFY that MAX F. DEUTZ is a judge
18 of the Superior Court of the State of California, for the
19 County of Los Angeles; that the minutes of the court reflect
20 that the above-entitled matter was heard by him on Monday,
21 December 6, 1976; that the minutes of the court also reflect
22 that RICHARD B. COLBY, CSR, was the official reporter and did
23 report the proceedings on the dates listed in the reporter's
24 certificate.

25 IN WITNESS WHEREOF, I have hereunto set my hand and
26 annexed my seal at my office in said county this 9th day of
27 December 1976.

28 JOHN J. CORCORAN, Acting County Clerk
and Acting Clerk of the Superior Court,
for the County of Los Angeles, State
of California.

By: H. H. MENDE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 54

HON. MAX F. DEUTZ, JUDGE

WHITE FRONT STORES, INC.
a California corporation,
et al.,

Plaintiffs and
Cross-Defendants,

vs.

No. C 50105

ESGRO, INC., a California
corporation, et al.,

Defendants and
Cross-Complainants.

REPORTER'S PARTIAL TRANSCRIPT

December 9, 1976

APPEARANCES:

For Plaintiffs and
Cross-Defendants:

LOEB & LOEB
By: ROBERT A. HOLTZMAN

SHEA, GOULD, CLIMENKO & CASEY
By: DANIEL L. CARROLL

BALL, HUNT, HART & BROWN
By: JOSEPH BALL

For the Defendants and
Cross-Complainants:

GIBSON, DUNN & CRUTCHER
WESLEY G. HOWELL, JR.
ARTHUR L. SHERWOOD
By: ARTHUR L. SHERWOOD

RICHARD B. COLBY, CSR #1080
Official Reporter

COPY

1 LOS ANGELES, CALIFORNIA, THURSDAY, DECEMBER 9, 1976

2 9:40 A.M.

3
4 (The following proceedings were held
5 in chambers:)

6 THE COURT: I just had a telephone call, with counsel
7 in this matter present but not listening to the other end
8 of the conversation, from Judge Gagliardi in New York.
9 Judge Gagliardi told me he was calling with the consent of
10 the attorneys representing these parties in New York and
11 that he had had an informal discussion this morning with
12 counsel where they had discussed without a formal hearing
13 the question of an order to show cause why the court should
14 not recall its order striking an amendment to the claim in
15 the New York proceedings.

16 He indicated that he had granted the order to
17 strike in the initial instance because he was planning to go
18 to trial with the matter in New York and he thought it was
19 too late a date to have an amendment to the proceeding
20 there and he was satisfied that most of what the cross-
21 complainants here, or the complainants there, were talking
22 about might be covered under the claim as it then existed.

23 He wanted to talk to me because he said he did
24 not want to hinder the proceedings here and would be inclined
25 to make an order whichever way I felt that the matter should
26 go here in California.

27 I explained to him that I made my ruling on the
28 basis of not only the lateness of the proceeding and the

2
1 difficulty of going to trial immediately without discovery
2 on the issues of specific misrepresentations that were
3 alleged in the proposed amended cross-complaint, but I was
4 also concerned about this trial here going into issues that
5 were beyond the parameters or beyond the limits of the
6 authority given by the New York court for a civil court
7 here in California to try the matter.

8 Judge Gagliardi indicated that he hadn't thought
9 of that problem and he was interested in that aspect of the
10 case. Then I also indicated to him that I was a little
11 concerned that if he enlarged the claim there in New York
12 by permitting the amendment and I did not permit a similar
13 amendment here in California, we might wind up with trying
14 only part of the pending issues and then leaving more issues
15 back in the bankruptcy court that would hold up the closing
16 of the estate back there. And that also interested him very
17 much and he asked me ultimately whether I wanted the matter
18 enlarged by an amendment back there and I said, frankly, the
19 way it stood right now I did not because I felt that it was
20 only going to create more problems for him and for us if we
21 did so.

22 So he said he was going to drop it at that point.
23 So that's the story.

24 MR. SHERWOOD: Well, I think we would still like for
25 the record to renew our motion to permit the amendment here.

26 As I understand what Judge Gagliardi said, in
27 essence, he hadn't intended to put any kind of formal or
28 informal restriction on what the California court would do.

1 THE COURT: Well, he did say that he did not want to
2 circumscribe me here in Los Angeles. But at the same time
3 he admitted that he hadn't considered the problems that
4 might be created legally by either the circumscribing or
5 lack of circumscribing that was done by the bankruptcy court
6 in New York which controlled the estate.

7 MR. SHERWOOD: I should say, also, that I think we are
8 going to have one of the problems that Your Honor mentioned
9 in any event. Regardless of what happens, there is going to
10 be some element of uncertainty if we continue the way we
11 are now. The order in New York will be appealed, I'm quite
12 certain, and --

13 THE COURT: What?

14 MR. SHERWOOD: It will be appealed, the order striking
15 the amended proof of claim, and we are going to have that
16 element of uncertainty in any event.

17 THE COURT: Well, I am aware of that. I doubt very
18 much, though, whether an appellate court will upset him on
19 striking the motion to amend, because that is a pretty
20 discretionary act, and it was done in anticipation of
21 immediate trial in New York.

22 MR. HOWELL: It was entered on the docket and filed
23 after he had been stayed. I think that order is, in fact,
24 a nullity.

25 MR. CARROLL: He had not been stayed. The court of
26 appeals stayed Judge Cannella's order. It did not stay any
27 other action in the bankruptcy proceeding, including an
28 action on the proof of claim.

1 MR. HOWELL: Staying Judge Cannella's order refers it
2 back to Judge Ryan. Judge Gagliardi doesn't have any
3 jurisdiction at all.

4 MR. BALL: All it does is stay the commencement of the
5 trial, is all.

6 MR. SHERWOOD: In a conversation with counsel this
7 morning, and also in looking at one of their proposed
8 exhibits that they have in mind amending or supplementing
9 their pleadings in some fashion --

10 MR. CARROLL: No, we don't.

11 MR. SHERWOOD: -- and I think it is appropriate to
12 raise that question too.

13 MR. BALL: We intend to follow the pleadings and put
14 in proof as to the amount of money that he owes altogether.

15 MR. HOWELL: Well, your pleading says that you are
16 going to amend.

17 MR. BALL: Amend to conform to proof.

18 MR. HOWELL: We will amend to conform to proof, then.
19 Maybe that's right. I don't think, frankly, we need the
20 amended complaint to get in all the evidence we want to put
21 in. And so as long as the evidence comes in, and as long
22 as we are going to frame jury instructions based on the
23 evidence that comes in, I am not very concerned.

24 I think that the uncertainty that is going to
25 exist is unfortunate, but, frankly, I figure that is more
26 their problem than ours. It is kind of too bad that the
27 estate is going to be held up.

28 MR. BALL: We expect to go to the jury on the allegations

1 of your complaint, and at the close of your case if you
2 haven't proven a case, we will ask the judge to take that
3 issue away from the jury. And we may ask him to do it
4 anyway, because of the uncertainty of your pleadings.

5 MR. HOWELL: We will ask the judge to limit you to
6 allegations in your complaint too, then.

7 MR. BALL: Well, that is all right. We don't care.
8 We are going to offer certain evidence as to what the
9 escrow company owes under their contract.

10 MR. SHERWOOD: So it is clear what we are talking
11 about, there is a damage, or some sort of schedule which I
12 think White Front intends to offer or use to try to show
13 a supposed minimum rents due through April of 1973.

14 The complaint was filed prior to that date.
15 There is no claim, I think, in the complaint for minimum
16 rent through April of '73. There is an allegation which
17 says there may be a continuing obligation and plaintiffs
18 will seek leave of court to amend this complaint to set
19 forth the true amounts of said liabilities at or prior to
20 the trial hereof.

21 THE COURT: That is in the complaint.

22 MR. SHERWOOD: That is in the complaint. So as I
23 understand it, they are proposing to open up their pleadings.

24 THE COURT: Well, that is sort of routine, isn't it?

25 MR. SHERWOOD: No. It is a different time period.

26 THE COURT: To add a clause like that in the complaint
27 when you have an open end issue of damages?

28 MR. HOWELL: I think this is a little different, in

1 that the defenses we have as to the minimum rents for April
2 30, 1972 are not the same as the defenses we would urge for
3 the minimum rents due April 30, 1973.

4 MR. BALL: What is the difference?

5 MR. HOWELL: For example, you are the ones that
6 closed all the stores and forced us out prior to the end of
7 the second annual period. We clearly don't have that
8 defense to the first period. As to the first period, the
9 testimony is going to be clear that Mr. Epstein and Mr. Esgro
10 really thought there would be a full year. That may be a
11 defense to the first period, but it is not to the second.

12 MR. BALL: I don't know how that is a defense when you
13 have writings directly to the contrary.

14 MR. HOWELL: The defenses are not the same.

15 MR. BALL: But you can't -- you cannot amend a contract
16 orally that is in writing. Not only in writing, but two or
17 three times in writing.

18 MR. HOWELL: I don't want to argue the merits of
19 either defense. What I am saying, they are not the same.

20 MR. BALL: The whole issue is whether or not you owe
21 minimum rents there and they were due and payable on April
22 30, 1972. You don't have any right to stay in the stores
23 if you still owe the rents.

24 MR. HOWELL: If you breached your agreement by closing
25 the stores, I think it is clear we do not owe minimum rent
26 for the period ending April 30, 1973.

27 MR. HOLTZMAN: Even to the extent that you continue
28 to occupy and do business in the stores?

1 MR. HOWELL: If you breached your agreement, clearly --

2 MR. HOLTZMAN: You are entitled to remain there and
3 not pay rent?

4 MR. HOWELL: We are entitled to not pay minimum rent.
5 We may have an obligation to pay percentage rent.

6 MR. BALL: We are only charging for those stores that
7 you stayed in up until April of 1973.

8 MR. SHERWOOD: At this point we don't know what you
9 are charging for and what you are not charging for. Of course
10 it is not in the pleadings, and that is presumably the
11 subject of some future proposed amendment, or something.

12 MR. HOLTZMAN: The pleading is that you continued in
13 possession.

14 MR. BALL: You were in continuous possession as of
15 February 1973 when this complaint was drawn. And they simply
16 asked for you to amend when they asked for the total rent.

17 Now the minimum rent couldn't be computed until
18 the end of April 30. But you hadn't even paid percentage
19 rent from the month of August on around to when you went into
20 Chapter -- you cannot stay there without rent.

21 MR. SHERWOOD: One of the things you were arguing with
22 respect to our amendment was timeliness. Now you are talking
23 about an amendment for a period of rent that was due April
24 1973.

25 MR. HOLTZMAN: Technically it is a supplement, not an
26 amendment.

27 MR. SHERWOOD: That is clearly something you could
28 have done more than three years ago. What we sought to

1 clarify was something that we discovered six months ago
2 through discovery, through your finally producing documents.

3 MR. CARROLL: I think the exhibits read in evidence
4 so far completely contradict that. But that is beside
5 the point.

6 MR. HOWELL: Contradict what?

7 MR. CARROLL: That you discovered it in the course of
8 discovery.

9 MR. SHERWOOD: We will be happy to argue that. It is
10 certainly not the case.

11 THE COURT: I don't think there is anything more to
12 decide at this point. So we might just as well go on with
13 the testimony.

14 * * * * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPT. NO. 54

HON. MAX F. DEUTZ, JUDGE

WHITE FRONT STORES, INC.,
a California corporation,
et al.,

Plaintiffs and
Cross-Defendants,

vs.

ESGRO, INC., a California
corporation, et al.,

Defendants and
Cross-Complainants.

No. C 50105

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, RICHARD B. COLBY, CSR, Official Reporter of
the Superior Court of the State of California, for the County
of Los Angeles, do hereby certify that the foregoing pages
1 through 8 comprise a true and correct partial
transcript of the proceedings held in the above-entitled
matter on December 9, 1976.

Dated this 1st day of FEBRUARY 1977.

CSR No. 1080

Official Reporter

1 LOEB AND LOEB
2 ONE WILSHIRE BUILDING
3 WILSHIRE BLVD. AT GRAND AVE.
4 LOS ANGELES, CALIFORNIA 90017
5 TELEPHONE: (213) 627-4241

SA 68

FILED

JAN 7 - 1977

John J. Corcoran, Acting County Clerk

By H. H. MENDE Deputy

ATTORNEYS FOR _____

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

11 WHITE FRONT STORES, INC.,
12 etc., et al.,

Plaintiffs,

vs.

14 Esgro, Inc., etc., et al.,

Defendants.

NO. C 50105

17 ESGRO, INC., etc., et al.,

Cross-Complainant,

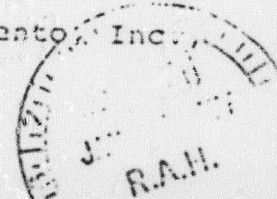
vs.

20 WHITE FRONT STORES, INC.,
21 et al.,

Cross-Defendants.

J U D G M E N T

23 The within civil action came on regularly for trial
24 on December 3, 1976, and thereafter, in Department 54 of the
25 above entitled court, the Honorable Max F. Deutz, judge pre-
26 siding. Plaintiffs and cross-defendants White Front Stores, Inc.,
27 White Front Costa Mesa, Inc., White Front Downey, Inc., White
28 Front Thousand Oaks, Inc., White Front South Sacramento, Inc.



1 White Front La Mesa, Inc., White Front Oakland, Inc., White
2 Front San Jose, Inc., White Front Sunnyvale, Inc., White Front
3 Sacramento, Inc., White Front Pleasant Hill, Inc., White Front
4 Fresno, Inc., White Front South San Francisco, Inc., White
5 Front San Diego, Inc., White Front San Francisco, Inc., White
6 Front Newark, Inc., White Front Richmond, Inc., White Front
7 Tacoma, Inc., White Front Seattle, Inc., and White Front Burien,
8 Inc. (hereinafter "plaintiffs") and cross-defendant Interstate
9 Stores, Inc., appeared by their attorneys Shea Gould Climenko
10 & Casey by Daniel L. Carroll, Ball, Hunt, Hart, Brown & Baerwitz
11 by Joseph A. Ball and Loeb and Loeb by Robert A. Holtzman, and
12 cross-complainant California Wholesale Electric Company,
13 formerly known and referred to during the trial as Esgro, Inc.
14 and defendant and cross-complainant Triumph Sales, Inc. ap-
15 peared by their attorneys Gibson, Dunn & Crutcher by Wesley
16 G. Howell, Jr. and Arthur L. Sherwood.

17 A jury of twelve persons was impaneled and sworn,
18 witnesses were sworn and testified, and documentary evidence
19 was presented. At the conclusion of the plaintiffs' case,
20 the court granted a non-suit as to plaintiffs' claims against
21 defendant Francis J. Esgro. Plaintiffs were permitted to file
22 and filed their first supplemental complaint to conform to proof.
23 It was stipulated by the parties that plaintiffs may have and
24 recover judgment against Triumph Sales, Inc. in the sum of
25 \$36,579.75, including interest to the date hereof, after all
26 cross-claims and offsets, including specifically any claim of
27 offset arising out of the purchase of certain liquor department
28 fixtures by plaintiff from Triumph Sales, Inc. during 1972, and

1 that the court may enter judgment pursuant to such stipulation
2 without submitting the subject matter thereof to the jury.

3 The court reserved, for determination by the court
4 following resolution of all other issues, all issues as to
5 attorneys' fees to be awarded to the prevailing parties on the
6 contract claims, and the computation of interest.

7 Thereafter, further evidence was adduced, the matter
8 was argued to the jury and the jury was duly instructed by the
9 court as to all issues other than those upon which non-suit
10 had been granted, and those reserved for determination by the
11 court, and those covered by the foregoing stipulation for
12 judgment. The jury deliberated and thereafter returned verdicts
13 and special findings on those issues submitted to it by the
14 court, as follows:

15 ON WHITE FRONT'S COMPLAINT FOR RENT, etc. (Check One)

16 ☒ / For White Front and assess damages in the amount
17 of \$1,350,558.51 plus interest.

18 ☐ / For Esgro.

19 ON ESGRO'S CLAIM OF BREACH OF CONTRACT. (Check One)

20 ☐ / For Esgro and against White Front and assess damages
21 in the amount of \$_____.

22 ☐ / For Esgro and against Interstate and White Front and
23 assess damages in the amount of \$_____.

24 ☒ / For White Front and Interstate.

25 ON ESGRO'S CLAIM OF FRAUD. (Check One)

26 ☐ / For Esgro and against White Front and assess damages
27 in the amount of \$_____.

28 - - -

1 / / For Esgro and against White Front and Interstate and
2 assess damages in the amount of \$ _____ SA 71

3 / X / For White Front and Interstate.

4

5 (You may but need not check and complete the next two items.)

6 / / We also assess punitive damages against White Front
7 in the amount of \$ _____.

8 / / We also assess punitive damages against Interstate
9 in the amount of \$ _____.

10 ON ESGRO'S CLAIM OF INTERFERENCE WITH CONTRACT. (Check One)

11 / / For Esgro and against Interstate and assess damages
12 in the amount of \$ _____.

13 / X / For Interstate.

14 ON SPECIAL INTERROGATORY NO. 1

15 Did White Front or Interstate or either of them,
16 sometime prior to December 1970, determine to close all
17 or substantially all of the White Front Stores?

18 Yes _____ No X _____

19 ON SPECIAL INTERROGATORY NO. 2

20 Are the parties to the rental agreement between White
21 Front, as licensor, and Esgro, Inc., as licensee, bound by the
22 definition of "selling space" as defined by White Front?

23 Yes X _____ No _____

24 ON SPECIAL INTERROGATORY NO. 3

25 Was Esgro, Inc. in default as of November 21, 1972,
26 in the payment of minimum compensation for the rental of
27 residential interior departments in White Front stores for the
28 licensed year ending April 30, 1972, and for advertising costs

1 incurred by White Front at the request of Esgro, Inc., after
2 giving due credit for offsets for any sums due and payable from
3 White Front to Esgro, Inc.?

4 Yes X No _____

5 Said verdicts and special findings were filed on
6 January 6, 1977.

7 The court duly considered all evidence presented
8 to it on the foregoing issues reserved for determination by
9 the court.

10 It appearing from the foregoing verdicts and special
11 findings and the foregoing stipulation of the parties and the
12 evidence adduced in respect to the computation of interest
13 and the amount of attorneys' fees to be awarded to the pre-
14 vailing parties on the contract counts that (1) plaintiffs
15 are entitled to recover on their first supplemental complaint,
16 and (2) defendants and cross-complainants are not entitled to
17 recover on their cross-complaint for fraud or breach of contract
18 or for interference with contractual rights and relationships
19 or for punitive damages:

20 NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED
21 as follows:

22 1. Plaintiffs, jointly and severally, shall have
23 and recover from defendant California Wholesale Electric Company,
24 formerly known as Esgro, Inc., the sum of \$1,350,558.51, to-
25 gether with interest to the date hereof in the sum of \$388,014.72
26 and attorneys' fees in the sum of \$ _____, a
27 total of \$ _____.

28 2. Plaintiffs, jointly and severally, shall have and

1 recover from defendant Triumph Sales, Inc. the sum of \$36,579.75.

2 3. Plaintiffs, jointly and severally, shall have
3 and recover from defendants California Wholesale Electric Company,
4 formerly known as Esgro, Inc., and Triumph Sales, Inc., and
5 each of them, jointly and severally, their costs of suit
6 hereby taxed in the sum of \$_____.

7 4. Defendants and cross-complainants California
8 Wholesale Electric Company, formerly known as Esgro, Inc. and
9 Triumph Sales, Inc. shall take nothing by their cross-complaint
10 herein, and the same is, hereby, dismissed.

11 THE CLERK IS ORDERED TO ENTER THIS JUDGMENT FORTHWITH.

12 Dated: JAN 7 - 1977

13
14 MAX F. DEUTZ

15 _____
16 Judge of the Superior Court
17
18
19
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24
25
26
27
28

(VERIFICATION - 445 and 2015.5 C.C.P.)

STATE OF CALIFORNIA,

County of _____

} ss.

I, the undersigned, say: I am the _____

in the above entitled action; I have read the foregoing _____

and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on _____

(date)

at _____

(place)

California

(Signature)

(PROOF OF SERVICE BY MAIL - 1013a, and 2015.5 C.C.P.)

STATE OF CALIFORNIA,

County of Los Angeles

} ss

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding, thatmy business address is One Wilshire Building, Suite 1600, Wilshire Boulevard at Grand Avenue, Los Angeles, California 90017that on January 7, 1977, I served the within _____(Proposed) JUDGMENT
defendants and cross-on the complainants in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at _____ One Wilshire Buildingin the City of Los Angeles, California, addressed to the attorney S of record for said partiesat the office address of said attorney S, as follows: _____GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, California 90071

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on January 7, 1977

(date)

at Los Angeles

(place)

California

(Signature)

Two (2)
Service of three (3) copies of the within
is admitted this 7th day of March 1977

Lawrence M. Altman for Weir, Gotschal & Mangan
Attorneys for California Wholesale Electric Company

3/7/77 @ 12:55 PM
J. M. Glass for Zachary Rodin & Gooden
Attorneys for Institutional Investors

White GEC